BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK NISTLER	)	
Claimant	)	
	)	
VS.	)	
	)	
FOOTLOCKER, INC.	)	
Respondent	)	Docket No. 1,024,626
	)	
AND	)	
	)	
AMER. CASUALTY CO. OF READING, PA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the April 4, 2007 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on July 25, 2007.

APPEARANCES

Timothy W. Ryan of Manhattan, Kansas, appeared for the claimant. John C. Kennyhertz of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed there was no dispute with the Administrative Law Judge's (ALJ) determination claimant suffered a 10 percent functional impairment to his back.

ISSUES

This is respondent's request for review of the ALJ's determination claimant sustained a 49.2 percent work disability based upon an 80.8 percent task loss and a 17.6 percent wage loss.

The respondent requests review of the nature and extent of disability. Respondent argues claimant is currently earning more than 90 percent of his stipulated pre-injury average gross weekly wage and therefore should be limited to a 10 percent functional impairment. Respondent argues claimant's post-injury base wage should be multiplied by 40 hours and with the addition of overtime he is making more than 90 percent of his pre-injury gross average weekly wage.

Claimant argues he is earning less than 90 percent of his pre-injury average gross weekly wage and therefore is entitled to a work disability. Claimant further argues he is averaging less than 40 hours per week and when his actual wage is used, he is earning less than 90 percent of pre-injury wage. Claimant requests the Board to affirm the ALJ's determination that he is entitled to a work disability but claimant notes the ALJ miscalculated the percentages of task loss and the correct calculation results in a 50.2 percent work disability. *[82.8% task loss (average of 91.7 and 73.9%) and 17.6% wage loss]*

The sole issue for determination by the Board is the nature and extent of disability. Specifically, whether post-injury claimant is earning 90 percent of his pre-injury average gross weekly wage and, if not, the percentage of his work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a material handler II in the receiving department for the respondent. In the 26 weeks before the accident the claimant typically worked Monday through Saturday for nine and three quarter hours a day. Claimant testified that he averaged more than 50 hours a week. At the time of the accident the claimant was earning $13.19 an hour and was paid overtime at one and a half times the hourly rate for every hour worked over 40 hours a week.

The claimant injured his back on November 9, 2004. As he was unloading a trailer some overhead boxes fell and as he attempted to shove the falling boxes aside he twisted injuring his low back with an immediate onset of pain radiating into his right lower extremity. A CT scan performed on December 21, 2004, revealed a lateral disk herniation to the right at L3-4. Claimant received physical therapy, prescription medication and series of three epidural injections. Claimant is currently taking over the counter medication for his back pain.

After his accident in November 2004, the claimant remained in the receiving department but only worked 6 hours a day as a sorter for approximately six weeks. Claimant then returned to working the same pre-injury hours but performing light-duty work

training other employees. After claimant reached maximum medical improvement on April 7, 2005, his job title changed to a material handler I and he was transferred to a position in quality control. When his job changed to quality control his hourly pay was reduced by $1.05 and he was not eligible for additional incentive pay, which varied considerably, that he was eligible for while working in the receiving department. And in quality control the claimant's hours varied from as low as 24 hours a week to as high as 48 hours a week. Claimant testified that he averaged 32 hours a week in the quality control job. Claimant testified that his hourly pay rate is $14.23.

Claimant agreed that he was expected to work 40 or more hours a week when he was in the receiving department. After his injury the claimant has worked more than 40 hours a week on some occasions but not as often as when he was in the receiving department. But claimant agreed that he is expected to work 40 or more hours a week if the work is available. And claimant noted that three or four times a year returns from the stores come in and he would then work at least 10 hours a day, six days a week.

Jamie Hill, respondent's employee relations manager, testified that claimant has always been designated as a full-time employee. Ms. Hill testified that a full-time employee is one who averages more than 32 to 34 hours per week. But all employees are told they work on average 40 hours per week but are required to work as many hours as business needs dictate. Some weeks could be less than 40 hours a week and some weeks could be substantially more than 40 hours dependent upon the time of the year and the volume of work. Ms. Hill testified that both before and after his injury the claimant has had to work over 40 hours per week. And both before and after his injury there have been occasions when he has worked less than 40 hours a week. But respondent expects claimant to be available for work in excess of 40 hours if the respondent has sufficient business.

Ms. Hill testified that claimant's pre-injury compensation rate was $13.19 per hour and he continued to receive that through June 27, 2005. When respondent received the documentation that claimant had reached maximum medical improvement and had permanent restrictions it was determined he could no longer perform the material handler II position. At that time claimant changed positions to a material handler I in quality control and his compensation rate changed to $12.68 per hour. On July 1, 2005, claimant received a merit pay increase which changed his hourly rate to $13.49 an hour. On February 12, 2006, respondent implemented a skill base pay increase of 20 cents an hour for hours actually worked in the plant. While on vacation or sick leave claimant did not receive the 20 cent skill base pay. On April 30, 2006, claimant received another merit pay increase which changed his hourly rate to $14.03 per hour or $14.23 for hours actually worked in the plant. Ms. Hill testified that a Material Handler II in receiving does not typically work more hours than a Material Handler I inbound auditor in quality control.

At the request of his counsel, claimant was evaluated by Dr. Peter V. Bieri, who is board certified by the American Academy of Disability Evaluating Physicians. Dr. Bieri examined claimant on June 17, 2005. Dr. Bieri rated claimant's functional impairment

pursuant to the AMA *Guides*[1] as 12 percent to the whole person. Dr. Bieri also recommended restrictions that claimant only occasionally lift up to 30 pounds; frequently lift not to exceed 20 pounds; and no more than 10 pounds of constant lifting. Repetitive twisting, bending, squatting, crawling and climbing should be performed no more than occasionally. Dr. Bieri reviewed the list of claimant's former work tasks prepared by Mr. Monty Longacre and concluded claimant could no longer perform 22 of the 24 tasks for a 92 percent task loss.

At the request of respondent's counsel Dr. Vito J. Carabetta, board certified in physical medicine and rehabilitation, evaluated claimant on December 1, 2006. Claimant's chief complaint was low back pain radiating into the right lower extremity. Dr. Carabetta diagnosed claimant with a herniated lumbar disk at L3-4 with radiculopathy. Dr. Carabetta rated the claimant using the AMA *Guides* and based upon the DRE Lumbosacral Category III opined claimant suffered a 10 percent permanent partial functional impairment. Dr. Carabetta imposed restrictions based upon a functional capacity evaluation that claimant limit occasional lifting to no more than 50 pounds with more frequent lifting or carrying not to exceed 30 pounds. Pulling force was not to exceed 55 pounds and pushing force limited to 91 pounds. Overhead lifting was limited to no more than 30 pounds. Bending and stooping activities were limited to an occasional basis. Dr. Carabetta reviewed the list of claimant's former work tasks prepared by Mr. Bud Langston and concluded claimant could no longer perform 17 of the 23 tasks for a 74 percent task loss.

Monty Longacre, a vocational rehabilitation counselor, interviewed claimant on July 29, 2005, at the request of claimant's attorney. He prepared a task list of 24 non-duplicative tasks claimant performed in the 15-year period before his injury. Mr. Longacre opined claimant retained the ability to earn from $7 an hour. Mr. Longacre agreed that respondent considers claimant a full-time employee.

Bud Langston, a vocational rehabilitation consultant, was asked by respondent's attorney to perform a vocational evaluation of claimant. In his report dated July 27, 2006, he identified 23 tasks claimant performed in the 15 years before his injury.

K.S.A. 44-510e(a) provides in pertinent part:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The claimant returned to work for respondent after his accidental injury and is currently making a higher hourly wage than he earned pre-injury. Respondent argues that

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

claimant's post-injury hourly rate should be multiplied times 40 hours and with the overtime claimant has received his post-injury wages would be equal to 90 percent or more than claimant was earning at the time of injury. Conversely, claimant argues that he only occasionally works 40 or more hours and that his post-injury wage should be based upon his actual earnings.

The claimant was considered a full-time employee. As previously noted Ms. Hill testified that claimant's employment status with respondent has always been considered full time. Ms. Hill testified:

> Q. Has Mr. Nistler ever performed part-time work for Foot Locker?
>
> A. He has always been designated as a full-time associate.
>
> Q. I'm not asking that as a legal question, but just as far as Foot Locker is concerned?
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> A. As far as the company is concerned, his employment status has always been full time.
>
> Q. And is it still full time, as far as Foot Locker sees it?
>
> A. Yes, it is.
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> Q. Referring to the period before Mr. Nistler sustained his injury in '04, were there weeks that he worked 40 hours per week?
>
> A. We would tell them - - we tell all employees here, hourly employees here, that they work, on average, 40 hours a week. We work as many hours as business needs dictate. Some weeks it could be less than 40, some weeks it could be substantially more than 40, it just depends on the time of year and the work volume that we have, because we tend to peak when our retail stores, just before our retail stores peak, so we have a lot of seasonal variation in the work we do.[2]

Claimant agreed that he was expected to work as long as business needs dictated and that both before and after his injury he worked some weeks more than 40 hours and some weeks less than 40 hours. And that several times a year he works 6 days a week 10 hours a day. Accordingly, claimant was expected regularly to work 40 or more hours per week, depending, of course, upon whether respondent had sufficient work.

The Act defines part-time and full-time workers in K.S.A. 2005 Supp. 44-511(a)(4) as follows:

> The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or

[2] Hill Depo. at 6-7.

> written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.
>
> (5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

Although claimant agreed to work on a regular basis for some weeks less than and some weeks more than 40 hours per week that does not preclude a finding that he was a full-time hourly employee. Claimant was expected to work or be available to work 40 hours a week.[3] In addition, a determination that claimant is a full-time hourly employee under the second alternative definition provided by K.S.A. 2005 Supp. 44-511(a)(5) may be made without finding the claimant was outside both definitions of a part-time hourly employee provided by K.S.A. 2005 Supp. 44-511(a)(4). It simply must be established that claimant was employed in a trade or employment where employees are considered full-time by custom of such employment regardless of the number of hours worked per day or per week.[4]

As previously noted, the uncontradicted testimony of Ms. Hill established that it was customary for employees such as claimant to be considered full-time hourly employees. The Board finds that claimant was a full-time hourly employee.

K.S.A. 2005 Supp. 44-511(b)(4) provides for the determination of the average gross weekly wage in the following manner:

> If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary

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[3] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[4] *Guebara v. Green-Glo Turf Maintenance, Inc.*, 16 Kan. App. 2d 159, 819 P.2d 135 (1991).

> number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, **but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee**, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation. (Emphasis Added)

As claimant was a full-time employee, even though he may have frequently worked less than a 40-hour week the average weekly wage is calculated using the base hourly wage times 40 and then adding the average overtime. This was the manner the parties apparently utilized to determine claimant's pre-injury average gross weekly wage and the statute requires calculation of the average gross weekly wage in the foregoing manner without distinction between pre-injury or post-injury average gross weekly wage. Although the result may appear harsh nonetheless that is what the statute requires in order to compare "apples to apples."

Moreover, the "loss of earning power" referenced by the ALJ is not the test to determine the post-injury average weekly wage as that concept is only applicable when imputing a wage, otherwise the statutory method to calculate the average gross weekly wage is required.

When claimant's post-injury hourly wage is multiplied by 40 hours and the average overtime indicated on the Stipulation filed March 15, 2007, is included the claimant is earning 90 percent or more of his pre-injury stipulated average gross weekly wage. Accordingly, the ALJ's Award is modified to limit claimant's compensation to his 10 percent functional impairment.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated April 4, 2007, is modified to reflect claimant is entitled to compensation for a 10 percent whole person functional impairment.

The claimant is entitled to 41.50 weeks of permanent partial disability compensation at the rate of $435 per week or $18,052.50 for a 10 percent functional disability, making a total award of $18,052.50, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of August 2007.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Timothy W. Ryan, Attorney for Claimant
John C. Kennyhertz, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge